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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 40 [redacted] 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

Appeal from the Supreme Court of the State of Indiana

BRIEF FOR APPELLANT

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IN THE

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OCTOBER TERM, 1944

No. 40

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR APPELLANT

The Opinion Below

The opinion of the Supreme Court of Indiana is not yet officially reported, but is reported in 51 N. E. (2d) 6, also in the Record, pp. 30-35, and Appendix A in the Statement as to Jurisdiction, p. 29.

Jurisdiction

Paragraph 1 of Rule 12 of the Rules of this Court has been complied with, and probable jurisdiction noted by this Court on April 3, 1944.

Questions Presented

The question presented for decision in this case is:

Whether the Gross Income Tax Act of 1933 of the State of Indiana as applied to gross receipts derived from interstate commerce in intangibles, corporate stocks and bonds, by the barter, sale and delivery thereof by residents of Indiana to residents of other states of the United States, by and through the facilities of interstate communication by telegraph and United States mail and interstate shipment by United States mail, in the usual and customary manner and course of such sales through the New York Stock Exchange by residents of Indiana to residents of other states of the United States, lays an illegal burden on such commerce in conflict with Article I, Section 8 of the Federal Constitution.

The Statute Involved

The statute involved is the "Gross Income Tax Act of 1933", Ch. 50, Indiana Acts, 1933, p. 388; Burns Indiana Statutes Annotated 1933, Sec. 64-2601, et seq., as amended in 1937, Indiana Acts 1937, Ch. 117, p. 604, Burns Indiana Statutes Annotated 1943 Replacement, Sec. 64-2601 et seq.

Section 1 of the Act and Section 1 of the Act of 1937 amending the same provide that the Act may be cited as the "Gross Income Tax Act of 1933".

The pertinent provisions of the Act will be found in the Appendix A, infra, pp. 44-47.

Regulations

The pertinent regulations of the Gross Income Tax Division of Indiana are set forth in Appendix B, infra, pp. 48, 49.

Statement

The facts in the case were stipulated, except only a letter from appellant to appellee, Exhibit 1, and appellee's letter in reply, Exhibit 2, before suit, which stipulation of facts, Exhibit 3, and said two other exhibits were admitted in evidence at the trial. Judgment was rendered and entered in favor of the appellant[1] for the recovery of the tax paid by appellant under protest for the year 1940, with interest thereon as provided by law, and costs. (R. 9.)

The Gross Income Tax Act of 1933, as amended in 1937, was challenged by the appellant in both courts below as being repugnant to the Constitution of the United States, as applied to the receipts of the appellant from sales of his corporate stocks and bonds and deliveries thereof from his domicile or residence in Indiana in interstate commerce through the New York Stock Exchange to persons resident of other states of the United States, by means of interstate facilities consisting of telegraph and United States mail.

The complaint shows on its face that this is the only issue or ground alleged in the complaint for the recovery of the tax paid. (R. 2.)

The appellee joined issues thereon by his answer, (R. 7), and the case was submitted to the trial court on said stipulation of facts, Exhibit 3, and said letters which passed between the parties before suit, Exhibit 1 and Exhibit 2.

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[1] Note: The said Gath P. Freeman, as Trustee aforesaid, was plaintiff in the trial court, appellee in the Supreme Court of Indiana, and is appellant in this appeal to the Supreme Court of the United States. The said Gilbert K. Hewit, as Director aforesaid, was defendant in the trial court, appellant in said State Supreme Court, and is appellee in this appeal.

In this brief (except quotations) "appellant" always refers to said Gath P. Freeman, as Trustee aforesaid, and "appellee" always refers to said Gilbert K. Hewit, as Director aforesaid.

There was no dispute of fact and the only issue in the case in either the trial court or the Supreme Court of Indiana was the question of law whether the application of the Gross Income Tax Act and the tax imposed thereby to the receipts of appellant from the interstate sales of his corporate stocks and bonds as alleged in his complaint and in the stipulation of facts was repugnant to Article I, Section 8 of the Constitution of the United States as constituting a regulation of and an illegal burden on interstate commerce.

The facts set forth in the stipulation and findings, so far as pertinent in this appeal, are summarized as follows:

Said Gath P. Freeman is and was at all times herein mentioned trustee under the will and of the estate of Henry C. Starr, deceased, late of Wayne County, Indiana, and was and now is domiciled in and a resident of Wayne Township in Wayne County, State of Indiana, and all matters, sales and transactions involved herein were matters, sales and transactions of said trust estate and were handled and performed by said trustee for the use and benefit and as the business of said trust estate, and said Gath P. Freeman at all times herein mentioned had and now has full and legal power and authority to act as such trustee; that neither said Gath P. Freeman, nor the estate of said Henry C. Starr, nor said Gath P. Freeman, as trustee aforesaid, had or has a place of business at any point other than at Richmond in Wayne Township, Wayne County, State of Indiana.

The situs of said trust estate and said corporate stocks and bonds sold by said trustee on behalf of said trust in the year 1940 was in said Wayne Township, Wayne County, Indiana. (Complaint, R. 2; Stipulation, R. 17.)

Said Gilbert K. Hewit was and is Director of Gross Income Tax Division, Department of Treasury of the State of Indiana, and was duly designated by the Governor of said state as such Director and as chief administrative officer charged with the administration and enforcement of the Indiana Gross Income Tax Act of 1933 and the Acts amendatory thereof and supplemental thereto. (R. 17, 18.)

In January, 1941, as required by law, the appellant filed a fiduciary gross income tax return with or in the office of the appellee for said trust for the year 1940 and paid the total amount of tax reflected on said return. In said return appellant included as taxable income an item of $65,214.20, constituting the aggregate gross receipts received by him from twenty separate sales of corporate stocks and bonds belonging to said trust sold in said year 1940, and the appellant paid the gross income tax thereon in the amount of $652.14 under protest. (R. 17, 18.) The property sold and the respective sales prices or gross receipts therefor are described and set forth in the complaint (R. 2, 3-4), and in the stipulation of facts (R. 17, 18-19).

All of said sales were handled in the usual and customary way of sales of intangibles through the New York Stock Exchange, and as further stipulated by the parties, the Court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. (R. 17, 21.)

All steps necessarily precedent to the institution of this action were taken by the appellant and appellee. (R. 17, 21.)

The sales were made in the following manner: The appellant placed orders to sell from time to time of the several stocks and bonds with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange. Said Sherman J. Brown was not a member of said New York Stock Exchange and could not himself make sales on said Exchange. (R. 17, 19-20.) (Opinion, R. 30, 31-32.)

At the time of placing said sales orders by the appellant with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the appellant knew and intended that the same would be communicated immediately by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New

York, and by them placed and offered on said New York Stock Exchange. (R. 17, 20.) (Opinion, R. 30, 32.)

Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds according to the sales orders of the appellant for sale on said New York Stock Exchange at the prices specified by the appellant in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana, over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the appellant of the sale and to deliver the stock certificates or bonds so sold. Thereupon the appellant delivered to said Sherman J. Brown in Richmond, Indiana, the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expense of sale, by United States mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the appellant less deduction of his broker's commission. (R. 17, 20.) (Opinion, R. 30, 32.)

Neither said Sherman J. Brown nor said Fenner and

Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said appellant upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as broker to procure sales thereof on or for commissions. (R. 17, 20-21.) (Opinion, R. 30, 32-33.)

All persons purchasing the intangibles so sold were non-residents of the State of Indiana; however, the appellant at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the appellant make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana. (R. 17, 21.) (Opinion, R. 30, 33.)

The judgment of the trial court in favor of appellant for the recovery of the tax paid with interest and costs (R. 9, 10) was reversed by the Supreme Court of Indiana with directions to sustain appellee's motion for a new trial and to enter judgment for the appellee. (R. 30, 35.)

Under said decision of the Supreme Court of Indiana and its construction of the Gross Income Tax Act of 1933 the tax imposed thereby is applicable to said gross receipts of appellant from such interstate sales of his corporate stocks and bonds.

Specification of Errors to be Urged

The errors of the court below will be urged as set forth in appellant's Assignment of Errors (R. 39, 40, 41) and may be summarized as follows:

That the Supreme Court of Indiana erred in holding that the Gross Income Tax Act of 1933 is valid as applied to gross receipts of appellant derived from sales of his corporate stocks and bonds conducted in interstate commerce, and in holding that the tax imposed by said Act on such gross receipts is not invalid as constituting an illegal burden on such commerce in conflict with Article I, Section 8 of the Constitution of the United States.

SUMMARY OF ARGUMENT

1

Burden on Interstate Commerce

The Indiana Gross Income Tax Act of 1933 as construed and applied by the Supreme Court of Indiana in this case (R. 30-35; 51 N. E. (2d) 6) imposes a tax upon the entire proceeds or gross receipts from sales by the appellant and all persons, including trustees of trust estates, fiduciaries and corporations, domiciled in or resident of the state, of intangibles, stocks and bonds, including proceeds or gross receipts from the same sold and delivered in interstate commerce to residents of other states. The rate of tax is one (1%) per cent of the gross receipts, payable quarterly. This tax is in addition to all ad valorem property taxes and other excise taxes. The gross income tax laid upon gross receipts from interstate commerce amounts to and is a regulation of and direct burden upon such commerce in conflict with and repugnant to

Article I, Section 8 of the Federal Constitution. It is immaterial what the nature of the tax is, since the result is the same, whether the tax is laid on the privilege of selling or doing business, or the right to receive gross income, or the privilege of domicile, or upon gross receipts as such, or other basis or pretext. The effect is to impose a tax upon the privilege of engaging in interstate commerce, which is tantamount to a tax upon the commerce itself, contrary to and in conflict with the commerce clause of the Constitution.

The invalidity and unconstitutionality of the Gross Income Tax Act of Indiana has been settled and adjudicated by this Court in the case of

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 58 Sup. Ct. 913,

so far as interstate and foreign commerce in manufactured goods or commodities are concerned, this Court holding therein that said tax was a regulation of and a direct burden upon such commerce in conflict with the commerce clause of the Federal Constitution and therefore unconstitutional and void as to such commerce.

Under the decision of the Adams case the State is not privileged to levy or collect the tax imposed by the Act on gross receipts derived from sales in interstate or foreign commerce.

The Supreme Court of Indiana cites the Adams case with approval, but construes the decision as applying to tangible property only, and does not follow it in this case. (R. 30, 34.)

The only question, therefore, in issue in this case is whether intangibles, stocks and bonds, are proper subjects of commerce and whether interstate sales and deliveries

thereof are transactions in commerce among the several states within the meaning of the commerce clause of the Federal Constitution.

2

Intangibles Are Subjects of Commerce, and Interstate Sales Thereof Constitute Interstate Commerce

The appellant contends that intangibles, corporate stocks and bonds, are subjects of commerce and that interstate sales and deliveries thereof to residents of other states constitute commerce among the several states protected against state taxation by the commerce clause of the Constitution of the United States, for the same reason and to the same extent as such sales and deliveries of tangible property. There is no inherent difference between sales of intangible property and sales of tangible property so far as interstate commerce is concerned or the taxing thereof by the several states. When intangibles are bartered and sold and delivered and thereby handled and treated by the parties as subjects or articles of commerce, they are subjects of commerce, and such interstate transactions therein constitute interstate commerce within the meaning of the Federal Constitution.

Oklahoma-Texas Trust v. Securities and Exchange Commission (1939), 100 Fed. (2d) 888, 889;

Electric Bond & Share Co. et al. v. Securities and Exchange Commission et al. (1937), 92 Fed. (2d) 580. (See opinion (15) and (17), pp. 589-590.) Affirmed by U. S. Supreme Court, 303 U. S. 419, 58 Sup. Ct. 678;

General Motors Acceptance Corp. v. Huron Finance Corp. et al. (1935), 262 N. W. 195;

And other cases cited in Argument, infra, pp. 33, 34.

ARGUMENT

The Basis of the State Court's Decision

In its opinion the State Court lays four premises, presumably as foundation for its decision in this case:

1. That there is a misconception that the Federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce; and that the immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government, but rather a protection against such commerce being subjected to the onerous burdens of multiple exactions. (R. 30, 33-34.)

   But, the appellant submits, the Indiana Gross Income Tax Act does impose an onerous tax burden and a danger and vice of multiple exactions on sales of intangibles in like manner and to the same extent as on sales of tangible property, as held with respect to sales of tangible property by the Supreme Court of the United States in the Adams case.

2. That as to sales of tangible property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller, and that by adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected. (R. 30, 34.)

   But, the appellant submits, the conclusion and decision of the State Court is to the contrary in

this case, the absolute and direct opposite of the Court's proposition or premise, the Court holding that where the interstate sales are of intangibles, as in this case, the state of the seller is privileged to tax. The appellant respectfully submits that the logic or reasoning of the State Court in this respect is fallacious, and that the decision of the Court could not in reason be based on that premise. The appellant is forced to the conclusion that the State Court must have been of the opinion, although not expressed, that intangibles were not subjects of commerce within the meaning of the commerce clause, which was the theory of the appellee at the trial and on appeal in the State Court.

3. That as to sales of tangible property in interstate commerce the Indiana Gross Income Tax Act is unconstitutional and not applicable. (R. 30, 34.)

But, the appellant submits, there is no inherent difference in sales interstate of tangible or intangible property so far as the commerce clause of the Constitution is concerned and the taxation of such commerce by the several states. If intangibles are subjects of commerce, which they undoubtedly are, the sales thereof interstate are entitled to the protection of the commerce clause to the same extent as sales of tangible property.

4. The only other premise laid by the State Court as foundation for its decision was to the effect that the situs of intangible property, such as stocks and bonds, is not of a transitory character, and that the rule of "mobilia sequuntur personam"—"the situs of the property is the domicile of the

owner"—applies thereto (R. 30, 34-35); from which the Court reasoned that if the situs of appellant's securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers and that the activities of appellant's agents in making the sales did not change the situs of his securities any more than they affected his domicile, and that it was immaterial that "said activities incidentally involved interstate commerce." (R. 30, 35.)

But, the appellant respectfully submits, the matter of situs is material in this case only for the purpose of establishing the interstate character of the sales. The appellant alleged in his complaint that the situs of the securities before sale thereof was in Wayne Township, Wayne County, Indiana (R. 2), and naturally the situs remained there until the sales were consummated by deliveries made in New York pursuant to the intent of the parties and the rules of the New York Stock Exchange. How does the matter of situs affect the question, except to prove that the sales were interstate sales? In case of sale the situs of any personal property, either tangible or intangible, for all purposes of taxation changes from seller to buyer at the point of delivery, which delivery point is fixed by agreement or intent of the parties, or by the New York Stock Exchange as to sales of securities thereon.

* * * * * * * *

The appellant discusses these propositions or premises of the State Court chronologically as follows:

1

As To Sales of Property in Interstate Commerce the Gross Income Tax Act of 1933 of the State of Indiana Cannot Constitutionally Be Enforced

As above indicated the law is well settled that the Gross Income Tax Act of 1933 of the State of Indiana is unconstitutional and void as to receipts from sales interstate of commodities by residents of Indiana to residents of other states of the United States, for the reason that such a state tax is a regulation of and an illegal burden upon interstate commerce prohibited by and repugnant to Article I, Section 8, of the Constitution of the United States.

J. D. Adams Mfg. Co. v. Storen etc., supra (1938), 304 U. S. 307, 58 Sup. Ct. 913.

The Adams case was decisive of the question whether sales of commodities or tangible property in interstate commerce were subject to taxation under the Gross Income Tax Act of Indiana, the judgment of the Supreme Court of the United States therein being that they were not.

The decision in the Adams case is in accord with a long and unbroken line of decisions involving similar state taxes.

Gwin, White & Prince, Inc., v. Henneford, et al. (1938), 305 U. S. 434, 59 Sup. Ct. 325;

Allied Mills, Inc., v. Department of Treasury (1943), 63 Sup. Ct. 666, affirming —— Ind. ——, 42 N. E. (2d) 34 (1942);

Galveston H. & S. A. Ry. Co. v. Texas (1907), 210 U. S. 217, 28 Sup. Ct. 638;

Crew Levick Co. v. Commonwealth of Pennsylvania (1917), 245 U. S. 292, 38 Sup. Ct. 126;

Stockard v. Morgan (1901), 185 U. S. 27, 22 Sup. Ct. 576;

In re Globe Varnish Co. (1940), 114 Fed. (2d) 916, affirmed 312 U. S. 690;

Postal Telegraph Cable Co. v. Adams (1895), 155 U. S. 688, 695, 15 Sup. Ct. 268;

State Freight Tax (1872), 15 Wall. 232, 277 (21 L. Ed. 146).

And the Adams case has not been modified or overruled but on the contrary has been cited with approval in the very recent Indiana case decided May 15, 1944, of

International Harvester Co. v. Department of Treasury, etc., 64 Sup. Ct. 1019, 1021.

The Supreme Court of the United States concluded and held in the Adams case that the tax was what it purported to be—a tax upon gross receipts from commerce—and as applied to sales interstate was a regulation of and a direct burden upon interstate commerce prohibited by Article I, Section 8, of the Constitution.

The appellant assumes, therefore, that it is not necessary to review the subject in general by way of support of the Adams decision, which stands as the settled and established law with respect to the Indiana gross income tax concerning sales interstate by residents of Indiana of commodities or tangible property, and, as the appellant contends, of any property which is the subject of commerce, including intangibles such as the corporate stocks and bonds of the appellant by him sold and delivered to residents of other states by and through the facilities of interstate commerce.

2

The State of the Buyer, But Not That of the Seller, Is Privileged to Tax

In its opinion in this case the State Supreme Court discussed with approval the doctrine that such a tax may be levied by the state of the buyer, but not by that of the seller. But the Court did not apply that theory in this case. In support of this formula the Court cited the case of Department of Treasury v. Allied Mills, Inc. (1942), an Indiana case, 42 N. E. (2d) 34, supra, affirmed by the Supreme Court of the United States, 318 U. S. 740, 63 Sup. Ct. 666, and the J. D. Adams Mfg. Co. v. Storen case, supra, 304 U. S. 307, 58 Sup. Ct. 913. (R. 34.)

After laying the major premise to the effect that "the Supreme Court of the United States has held that as to transactions relating to such property (tangible property) a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller," (R. 34), the State Court failed to continue the syllogism by laying the second or minor premise logically and obviously warranted by the undisputed evidence, the stipulation of facts (R. 17), to the effect that this appellant is the seller domiciled in Indiana, the situs of his intangibles before sale, and the Court failed to draw the logical and inevitable conclusion therefrom, which, the appellant respectfully submits, should have been to the effect, therefore, that the State of Indiana was not privileged to tax the receipts of the appellant derived from such interstate commerce.

It is impossible to understand why the State Court discussed that view or rule with obvious approval unless the Court believed it pertinent and applicable to this case. And if the Court did consider it applicable, as apparently it

did, the appellant respectfully submits that the Court should have followed through the logical sequence of reasoning and should have pronounced its finding, conclusion and decision accordingly.

The language used by the State Court in this connection was as follows:

> "Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller."

the Court citing the Allied Mills case and the Adams case in support thereof, as above stated. (R. 34.)

As in the case at bar, the matter of situs did not enter into the questions presented for decision in those cases, the facts as to situs having been undisputed or stipulated by the parties and having been admitted in evidence for the purpose merely of showing the interstate character of the sales and which state was that of the seller.

In this case it was conceded that the situs of appellant's intangibles before sale was in Wayne County, Indiana, the domicile of the appellant and the state of the seller, and that the sales and deliveries were made through the New York Stock Exchange in the usual and customary way to persons who were residents of other states of the United States, according to the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing the same. (Stipulation, R. 17, 21; Opinion, R. 30-35.)

In support of this rule announced by the State Court in this case, we cite the case of

McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33, 60 Sup. Ct. 388, 394, 398,

involving the New York City retail sales tax imposed upon purchasers for consumption of tangible personal property generally, with certain exceptions, and utility services in supplying gas, electricity, telephone service etc., in which case, the Supreme Court of the United States, in upholding the tax upon sales of coal from Pennsylvania to New York City as a tax "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption", said:

> "This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods—effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, (Citing cases) and when the extra-state seller has shipped them into the taxing state for sale there." (Citing cases.) (Page 394 of 60 Sup. Ct.)

and in discussing and distinguishing the Adams case the Court said:

> "In Adams Manufacturing Co. v. Storen, supra, 304 U. S. pages 311, 312, 58 S. Ct. pages 915, 916,—a tax on gross receipts, so far as laid by the state of the seller upon the receipts from sales of goods manufactured in the taxing state and sold in other states, was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities wholly intrastate, were included in the measure of the tax, the sales price, without segregation or apportionment. * * * (Citing cases.)

"The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax. * * *" (Page 398 of 60 Sup. Ct.)

In commenting upon this subject in 36 Illinois Law Review, pages 727-746 (March 1942, at pages 738, 739), the author said:

"But the true meaning of the Berwind-White case is obscure. There would appear to be at least three possible interpretations that might be placed on the decision: 1. The court really is adhering to the principles laid down in the cases of 1938 and is assuming that in some way the danger of cumulative burdens will actually be avoided, but failed in its opinion to say how. * * * (The cases of 1938 referred to are, in the order of their decision, Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 Sup. Ct. 546, the J. D. Adams Mfg. Co. case, supra, and Gwin, White & Prince, Inc., v. Henneford, supra.) * * * It can not be through the method suggested in the Adams and Gwin cases, viz., apportionment, since the New York tax was upheld without apportionment. There seems to be only one other way out * * * viz., the buyer's state (New York) can tax an interstate sale in full; the seller's state (Pennsylvania) cannot tax the same transaction at all. This theory would relieve interstate commerce from the danger of cumulative burdens while at the same time requiring it to pay its way, although it involves a more or less arbitrary choice between the two states. * * * This interpretation of the Berwind-White case appears to have been adopted by the Circuit Court of Appeals for the Seventh Circuit in a recent case." In re Globe Varnish Co., 114 F. (2) 916, 312 U. S. 690, supra.

The decision of the J. D. Adams Mfg. Co. case is in full accord with the decisions hereinabove mentioned, which decision is the law so far as the Indiana Gross Income Tax

Act and sales in interstate commerce by residents of Indiana to residents of other states are concerned.

* * * * * * *

The only case which seems to be at variance with the decisions above cited and discussed in connection with this subject is that of

O'Kane v. State (1940), 283 N. Y. 439, 28 N. E. (2d) 905,

cited by the State Court (R. 34), but not on this subject. That case involved a stamp tax upon "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares * * * whether made upon or shown by the books of the — corporation * * *." By a four to three decision of the Court of Appeals of New York it was held that the State of New York, the state of the seller, could constitutionally impose and collect said stamp tax and that no discrimination was practiced on interstate commerce by the imposition thereof, on the event of making of agreement for sale which occurred in New York, where the stock was located, prior to the transportation of the stock in interstate commerce.

While the O'Kane case involved sales of intangibles, that was in no sense an issue in the case or any basis on which the decision rested. The court made no distinction between sales of intangible or tangible property, apparently the parties had raised no such question, and the decision does not rest on any distinction between the two kinds of personal property.

The unanimous opinion of the court held that the sales interstate of such intangibles constituted interstate commerce. But the majority of the court, while approving the decision of the Berwind-White case and the principles

upon which it rested, reasoned and took the view that if the tax in the Berwind-White case was valid as a tax on a local taxable event, delivery of coal, in the state of the buyer, after interstate commerce had ended, the tax in the O'Kane case was likewise valid as a tax on a local taxable event in the state of the seller, consisting of the making of the agreement for the sale of the property, in the state of the seller, prior to the transportation of the property in interstate commerce. The entire court found that the agreement of sale was made in New York, where the property was located before sale, the state of the seller, and the majority of the court held that the making of the agreement of sale in the state of the seller before transportation in interstate commerce, although the sale had been negotiated by interstate telephone, telegraph and United States mail, was as much an incident of ownership and as much a taxable event as the delivery of the coal in the Berwind-White case in the state of the buyer after interstate commerce had ended. In basing its decision on that proposition the majority of the court used the following language:

> "In the case at bar certain goods, to-wit, shares of stock, were located in this State and were part of the common mass of property which undoubtedly was subject to taxation. The taxable event, to-wit, the making of the agreement for the sale of the property, occurred in this State prior to the transportation of the goods in interstate commerce, and was an exercise of one of the incidents of ownership. In imposing a tax on the exercise of one of the incidents of ownership, no discrimination was practiced on interstate commerce. Appellants object to the taxation of a local event because it is followed by interstate commerce. But unless local events occurring after interstate commerce has ended are clothed with a greater sanctity than are possessed by local events preceding interstate com-

merce, such objection must fail. McGoldrick v. Berwind White Coal Mining Co., supra." (28 N. E. (2d) at page 909.)

The court by majority decision rejected or misconstrued the principles and decisions of J. D. Adams Mfg. Co. v. Storen, supra, 304 U. S. 307, 58 Sup. Ct. 913, and Gwin, White & Prince, Inc., v. Henneford, supra, 305 U. S. 434, 59 Sup. Ct. 325, the court saying:

> "In cases such as Gwin, White & Prince, Inc., v. Henneford — and Adams Mfg. Co. v. Storen — the taxes there in question were held invalid because the taxable event was equally within the jurisdiction of States other than the one of origin and the one of destination, and hence the same event could have been taxed in each State through which the shipment passed if the levy had been sustained. But in the case at bar it may be said truly, as was said in McGoldrick v. Berwind-White Coal Mining Co., 'the present tax as applied to respondent is without the possibility of such consequences.' 309 U. S. at page 48, 60 S. Ct. at page 393 —. In the circumstances of the case at bar, as has been said, the taxable event is the making in this State of a contract to sell goods which are in this State. The event is no more recurrent than the taxable event in Berwind-White, and hence the possibility of cumulative taxes is equally absent." — (28 N. E. (2d) at page 909.)

The appellant does not understand that the decision in the case of J. D. Adams Mfg. Co. v. Storen was based on the proposition above stated in the majority opinion of the O'Kane case, but that the decision in the Adams case was really based on the findings of the Supreme Court of the United States as follows:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activ-

ities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution." (58 Sup. Ct. at page 916.)

"It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate." (58 Sup. Ct. at page 917.)

And in the case of Gwin, White & Prince, Inc., v. Henneford, supra, involving a tax of the State of Washington for the act or privilege of engaging in business activities, in the amount of ½ of 1% of the gross income of the business, the decision of the Supreme Court of the United States was based on the findings and opinion of the Court as follows:

"While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce — so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire inter-

state commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume. * * *

"But it is enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state (Citing cases) burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject. * * *

"If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation, discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. (Citing the Adams case and others.) * * *

"Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." (59 Sup. Ct. at pages 327, 328.)

Therefore, the appellant respectfully submits that the majority opinion of the Court of Appeals of New York in the O'Kane case misinterpreted the reasoning and misconstrued the force of the decisions of the Supreme Court of the United States in the cases of J. D. Adams Mfg. Co. v. Storen and Gwin, White & Prince, Inc., and that the decision in that case is contrary to precedent and the established law.

We discuss the O'Kane case at length because the Supreme Court of Indiana in this case cites the O'Kane case and purports to rely upon it (R. 34), although it does not appear from the opinion that the Court in anywise bases its decision on that case. Nor does it appear that the Court bases its decision on the Adams case. In fact, the appellant is at a loss to determine the basis of the decision, as it does not seem to be disclosed in the opinion, unless it can be justly concluded from the opinion that intangibles are not subjects of commerce, which was the theory of the appellee, as hereinafter shown.

To the appellant it appears that the dissenting opinion in the O'Kane case of Chief Judge Lehman, with Judge Loughran and Judge Conway concurring, in holding invalid the stamp tax there involved, is a more logical and better considered opinion than the majority opinion of the Court in that it recognized the rationale and gave effect to the decisions of the Supreme Court of the United States in said cases of J. D. Adams Mfg. Co. v. Storen, supra, and Gwin, White & Prince, Inc., v. Henneford, supra. We quote from the minority opinion as follows:

> "The plaintiff challenged the validity of the Tax Law of the State of New York — in so far as it purports to impose a tax upon the sale or transfer of the stock which the plaintiffs have sold and delivered

to persons outside of the State of New York, on the ground that such a tax constitutes an unlawful burden on interstate commerce.

"The sellers reside in New York and, unquestionably, the State would have power to tax their personal property here, including property which the plaintiffs intend to use in interstate commerce, until the moment when such property becomes part of a movement in interstate commerce. The purchasers live in other jurisdictions and, unquestionably, such jurisdictions would have power to tax their property immediately after it was delivered in the course of interstate commerce to the purchasers. The Tax Law of New York State, which is challenged, does not, however, attempt to tax the property of the plaintiffs or any exercise of power over such property by them, except in connection with a sale in interstate commerce.

"Every transaction in interstate commerce requires the performance of acts in two or more states. Here the contract was made by telephone, telegraph and mail, with the messages originating in one state and received in another state, and the contract of sale became effective only upon exchange of confirmation by the buyer outside of the State and the seller here. The shares of stock were mailed here, passed through other states to the cities where the purchasers did business. Payment was made there and transmitted to the sellers here. Authority of the State, if any, to tax the sale or transfer of the stock must rest upon the fact that the sellers lived here and the State had jurisdiction of the property before it entered into the stream of interstate commerce, or upon the fact that part of the transaction in interstate commerce occurred here.

"If the State of New York had power to tax the sale or transfer of this property on such grounds, then it would seem clear that Pennsylvania and the District of Columbia would each have the right to tax the

sale or transfer of such securities because the purchaser resides and the transfer is made there. But in such case 'interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.' Adams Manufacturing Co. v. Storen, 304 U. S. 307, 311, 58 S. Ct. 913, 916—Gwin, White & Prince, Inc., v. Henneford, 305 U. S. 434, 59 S. Ct. 325 —. It is said that there is no proof here that, in fact, Pennsylvania or the District of Columbia do impose any tax upon the transfer of the stock outside of this State or that, in this case, the sales have, in fact, been subjected to a tax burden greater than similar sales where purchaser and seller both live in the State of New York and transfer is made there. It is established by a long line of cases, referred to and approved in the two cases cited above, that interstate commerce may not be subjected to the risk of double taxation — whether, in fact, two or more States have joined in imposing multiple taxes is immaterial if the risk of multiple taxation exists. So, in Adams Manufacturing Co. v. Storen, supra, the Supreme Court of the United States declared invalid a State tax on gross income derived by a manufacturer from sales in interstate commerce, saying that the tax 'is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured.' 304 U. S. at page 311, 58 S. Ct. at page 916 —. I can find no distinction in principle between the tax there declared invalid and the tax which is here challenged. To sustain this tax we must reject the authority of what was so recently said and decided by the Supreme Court of the United States.

"The State, however, relies for authority to a great extent upon the later case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388—. It may hardly be supposed that the majority of the court intended in that case to destroy the force of

its previous decisions without even mentioning the decisions which it intended to overrule or weaken. In the last case the opinion by Mr. Justice Stone indicates clearly the factors which induced the court to sustain the tax in that case, though it was a tax on a sale in interstate commerce." (28 N. E. (2d) at pages 910, 911.)

"Here the tax is imposed upon the seller and not the buyer and it has no possible analogy to a 'use' tax or a property tax on goods at their destination. If this tax is sustained, then similar sales in interstate commerce may be subjected to the risk of a burden of multiple taxation which might impede or destroy such commerce, and similar taxes have been declared a violation of the Constitution whenever challenged. — Here the State has attempted to subject a sale in interstate commerce to the same single tax which must be paid on other sales and other states would have power, at least as good, to impose similar sales tax upon the same sale." (28 N. E. (2d) at page 912.)

* * * * * * *

That intangibles such as corporate stocks and bonds are subjects of commerce and interstate commerce is too well established for any serious doubt, which is supported by O'Kane v. State, supra, and by discussion and authorities following.

And, therefore, the rule announced by the State Court in this case applies as well to sales of intangibles in interstate commerce as to sales of tangible property.

The state of the seller is no more privileged to tax interstate sales of intangible property than it is to tax such sales of tangible property.

As To Sales of All Property, Both Tangible and Intangible, Which Are Subjects of Commerce and Sold in Interstate Commerce, the Gross Income Tax Act of 1933 of the State of Indiana Is Unconstitutional and Void

The State Supreme Court put a limited construction on the decision of the J. D. Adams Mfg. Co. v. Storen case, confining its effect to "tangible property" (R. 34), and so did the appellee under his theory of defense at the trial of this cause and on appeal to the State Court that the intangibles of appellant, his corporate stocks and bonds sold in interstate commerce, were not proper subjects of commerce or interstate commerce and that the commerce clause of the Federal Constitution and the decisions construing the same, the Adams case in particular, were not applicable to sales interstate of such intangibles.

To show that this was the theory of defense of the appellee and his theory on appeal to the State Court, we quote the following excerpts from his brief in said Court:

> "The issues were formed by the filing of an Answer in Denial — to plaintiff's Complaint —. The contentions of the parties were briefly as follows:
>
> "The appellee (appellant here) contended that the amounts received by him and covered by the evidence constituted gross income derived from business conducted in commerce between the State of Indiana and other States of the United States to such an extent that the State of Indiana is prohibited from taxing such income by Section 8, Article I of the Constitution of the United States of America.
>
> "The appellant (appellee here) contended that the transactions reflected by the evidence did not constitute that type of commerce which the State of In-

diana is prohibited from taxing under the provisions of the Commerce Clause of the Federal Constitution." (R. 24.)

Also:

"Stock certificates and bonds are documents which are evidences of the number of shares of stock which the holder of them owns or the amount of money due a lender and do not in themselves constitute choses of action or property." (R. 26.)

Also:

"The Prohibition of the Commerce Clause on Taxing Income from Tangible Property Does Not Apply to the Tax on Income When Intangibles Are Involved." (R. 28.)

Also:

"No constitutional objection can be successfully made against the taxation of the resident trustee involved here, measured by the gross receipts from his sales of intangibles — his sales of rights, the legal situs of which follow his person like the residence of an infant child follows that of his parents. An intangible right is incapable of shipment in interstate commerce, therefore, the ADAMS case and other cases of the same type involving shipments of corporeal objects in the channels of interstate trade can have no practical application here." (R. 29, 30.)

While the State Supreme Court did not expressly find that the intangibles involved were not proper subjects of commerce to which the commerce clause and the decisions construing the same apply, it would seem that the Court must have been of that opinion, as the decision in this case can hardly be justified on any other ground. Certainly no valid ground appears in the opinion on which to

base the decision, and since that was the theory of appellee's defense at the trial and on appeal in the State Court, it would seem that that was the basis of the decision, although not expressed in the Court's opinion.

The Constitution does not define the word "commerce," but as applied to trade it has been defined as the exchange of goods or property of any kind for money or for other goods or property.

Schill v. Remington Putnam Book Co. (1941), 17 A. (2d) 175.

The Gross Income Tax Act of 1933 of the State of Indiana (Appendix A, infra, pp. 44-47, and the regulations promulgated pursuant thereto (Appendix B, infra, pp. 48, 49) define, include and treat intangibles, including corporate stocks and bonds, as subjects of commerce and interstate commerce and impose the tax on all receipts or gross income from sales thereof, both intrastate and interstate, to the same extent and in like manner as from sales of tangible property, and the appellee as taxing official demands and collects the tax on sales of such intangibles, both intrastate and interstate sales, while at the same time asserting and contending that such intangibles are not subjects of commerce and barter, sale and delivery within the meaning of the commerce clause.

If intangibles are not subjects of commerce or interstate commerce within the meaning of the commerce clause, then in such case they are not subject to barter and sale intrastate, and there could be no sales thereof intrastate which would be subject to the tax imposed by the Act. If intangibles cannot be sold and delivered within the meaning of the commerce clause, they cannot be sold and delivered within the meaning of the Gross Income Tax Act of Indiana, and while the Act by its language embraces and

includes sales of intangibles, corporate stocks and bonds, the Act would be ineffective and no tax could be collected in said respect, since the Act imposes the tax on gross receipts from sales. The appellee would hardly contend that intangibles are not subjects of intrastate commerce, barter and sale intrastate, and yet he takes the anomalous position that they are not subjects of interstate commerce.

If the property sold is a proper subject of commerce, its sale and delivery across state lines is interstate commerce to which the decision of the Adams case would be applicable and controlling.

Intangibles Are Subjects of Commerce and Interstate Commerce

The appellant contends that such intangibles, corporate stocks and bonds, are as much the subject of commerce as are commodities or any other form of personal property, and that sales thereof across state lines by a resident of Indiana to residents of other states are no more subject to or liable for the gross income tax of Indiana than are sales of commodities or other forms of personal property.

This proposition is supported by many well considered cases, and we find no authority to the contrary.

Oklahoma-Texas Trust v. Securities and Exchange Commission (1939), 100 Fed. (2d) 888;

Parey v. Bache (1942), 125 Fed. (2d) 493;

General Motors Acceptance Corporation v. Huron Finance Corp. et al. (1935), 262 N. W. 195;

Electric Bond & Share Co. et al. v. Securities and Exchange Commission et al. (1937), 92 Fed. (2d) 580. (See opinion (15) and (17) pp. 589-590.) Affirmed by U. S. Supreme Court, 303 U. S. 419, 58 Sup. Ct. 678;

Bracey v. Darst (D. C.) (1914), 218 Fed. 482;
Industrial Acceptance Corp. v. Haering (1929), 253 Ill. App. 97;
Jones v. Securities and Exchange Commission (1935), 79 Fed. (2d) 617. (See opinion (4-6) p. 619);
Charles F. Champion v. Ames, U. S. Marshall (1903), 23 Sup. Ct. 321;
O'Kane v. State (1940), 28 N. E. (2d) 905;
Securities and Exchange Commission v. Torr (1936), 15 F. Supp. 315;
Securities and Exchange Commission v. Bailey (1941), 41 F. Supp. 647;
Securities and Exchange Commission v. Payne (1940), 35 F. Supp. 873;
Securities and Exchange Commission v. Tung Corp. (1940), 32 F. Supp. 371.

In this connection we quote from the case of Oklahoma-Texas Trust v. Securities and Exchange Commission (1939), 100 Fed. (2d) 888, 890, supra, in which the court in part said:

"The Trust contends that the Securities Act is unconstitutional for the reason that the transportation and sale of securities is not interstate commerce.

"In the Lottery Cases, 188 U. S. 321, 345, 23 S. Ct. 321, 322, 47 L. Ed. 492, the Supreme Court said:

'What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce.'

"While securities are mere evidences of obligations to pay money or of rights to participate in earnings and distribution of corporate, trust, and other property and are mere choses in action, nevertheless in modern commercial intercourse they are sold, purchased, delivered, and dealt with the same as tangible commodities and other ordinary articles of commerce. The mails and the facilities of interstate commerce are commonly used to effectuate their sale and transfer and we have no doubt that they should be regarded as subjects of interstate commerce and transportation." (100 Fed. (2d) at page 890.)

And in the case of Electric Bond & Share Co. et al. v. Securities and Exchange Commission et al. (1937), 92 Fed. (2d) 580, supra, the Circuit Court of Appeals, Second Circuit, on page 589 said:

"The suggestion that the power of the Federal government over interstate commerce is limited to the regulation of trade in or the movement of tangible commodities which are the subject of barter and sale has been repudiated." Citing cases.

"If Congress has the power to compel a holding company to register when it makes a public offering of securities through the mail or interstate channels, it also has the power to compel a holding company to register if it sells a security having reason to believe that such security by use of the mails or other means or instrumentality of interstate commerce will be distributed or made the subject of a public offering. The registration requirements here are similar to the requirements for registration of securities under the Securities Act of 1933 as amended in 1934 * * *." (Page 590.) (Affirmed by the Supreme Court, 303 U. S. 419 (1938).)

In the case of Jones v. Securities and Exchange Commission, 79 Fed. (2d) 617, supra, (1935), the Circuit Court

of Appeals, Second Circuit, in its opinion aptly said: (Opinion (4-6) p. 619.)

> "The appellant contends that the Securities Act of 1933 as amended is unconstitutional because the securities are not subjects of commerce. But the power of Congress as it relates to control over the use of the mails is fully sustained by the cases which have considered the mail fraud statutes." (Citing cases.)

The case of General Motors Acceptance Corporation v. Huron Finance Corporation et al. (1935), 262 N. W. 195, supra, is also squarely in point, involving sales of conditional sale notes across state lines and suit in the buyer's state for possession of the automobile covered by the notes, the Supreme Court of South Dakota in its opinion saying: (Opinion, p. 200.)

> "Respondent contends that the appellant was not engaged in interstate commerce because of the fact that notes and contracts per se are incapable of becoming articles of interstate commerce. We are not impressed with that contention as being a sound rule of law. We will, however, admit that under a certain statement of facts, as shown by some of the decisions, such is the case, but in those instances the contracts were not dealt with by the parties as articles of interstate commerce. The law seems to be quite well settled and established that stocks and bonds are proper subjects of interstate commerce and that the transaction of such articles of personal property from one state to another for the purpose of barter and sale and delivery constitutes not only commerce among the states of this country, but constitutes a *VERY LARGE AND IMPORTANT ELEMENT OF SUCH COMMERCE.*" (Our italics.) Citing cases.

In the case of Bracey v. Darst (D. C.), (1914), 218 Fed. 482, supra, involving the constitutionality of the "Blue Sky

Law" of West Virginia, the court succinctly said (Opinion, p. 495):

> "We do not think it can be longer questioned that stocks, bonds, debentures, and other securities are subject-matters of interstate commerce." Citing cases.

In the case of Industrial Acceptance Corporation v. Haering (1929), 253 Ill. App. 97, supra, the facts being similar to those in the General Motors Acceptance Corporation case, supra, the court held that the purchase of notes and contracts by a finance corporation from a resident of another state constituted an interstate commerce transaction.

The famous lottery cases are expressive of the law on this subject, and the opinion of the United States Supreme Court in the case of Champion v. Ames, United States Marshall (1903), 23 Sup. Ct. 321, supra, is eloquent on the question of lottery tickets being subjects of commerce and the power of the Federal Government to control the sale thereof and traffic therein in interstate commerce. The following excerpts are quoted from the opinion of the court:

> "What is the import of the word 'commerce' as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carrier of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several states include something more? Does not the carrying from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of certain amount of money therein specified, also constitute commerce among the states?" (Page 322.)

After quoting from the opinion of Chief Justice Mar-

shall in the leading case of Gibbons v. Ogden, the court said:

> "The principles announced in Gibbons v. Ogden were reaffirmed in Brown v. Maryland. * * * After expressing doubt whether any of the evils proceeding from the feebleness of the Federal government contributed more to the establishing of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the court, said: 'It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states.' Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several states, the court reaffirmed the doctrine that the power was 'complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. * * * Commerce is intercourse; one of its most ordinary ingredients is traffic.'" (Pages 323-324.)

And the court further said:

> "It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks of the United States to be applied by the agents representing the lottery company to the prompt payment of the prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that

the company would pay to him the amount of the prize drawn. * * * Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. * * * We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states." (Page 326.)

And the court further said:

"In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution." (Page 327.)

In the case of Parey v. Bache et al. (1942), 125 Fed. (2d) 493, supra, it was squarely held by the Circuit Court of Appeals, Fifth Circuit, that where a resident of Florida purchased listed stocks through the Miami, Florida, office of New York brokers, the purchases and sales of stock were purchases and sales of stock in interstate commerce.

And in the case of O'Kane v. State (1940), 28 N. E. (2d) 905, supra, the Court of Appeals of New York held that the negotiating of sales by interstate communication and the mailing of corporate stock certificates from New York to Philadelphia and to Washington, D. C., from seller to buyers, was interstate commerce.

The same is true as to traffic interstate in other forms of intangible property, according to cases hereinabove cited.

Therefore, the appellant respectfully submits, that the corporate stocks and bonds of appellant were proper subjects of commerce and that his sales thereof interstate constituted interstate commerce entitled to the protection of the commerce clause of the Federal Constitution.

4

Situs and the Rule of "Mobilia Sequuntur Personam"

The State Court discusses at considerable length the subject of situs and the rule of "mobilia sequuntur personam" (R. 34, 35), as did also the appellee in the State Court and at the trial (R. 24-30), but it is respectfully submitted that this represents no basis or ground for the decision of the State Court against the appellant here. The matter of situs and the said rule were not in issue in any sense.

It was alleged in the complaint (R. 2) and in the stipulation of facts (R. 17) that the domicile of appellant and the situs of his stocks and bonds at all times before said sales was in Wayne County, Indiana, and that the sales thereof were made and effected through the facilities of interstate commerce from the City of Richmond in said county and state through the New York Stock Exchange to residents of other states, as particularly described and set forth in said complaint and stipulation of facts. The matter of situs was conceded by both parties and there was no dispute as to said rule. The Indiana situs of appellant's stocks and bonds was alleged in his complaint to show the interstate character of his sales thereof, and for no other purpose, and the matter of situs and the rule mentioned have no other significance or importance in this case.

This being a case of interstate sales of corporate stocks and bonds, the cases cited by the State Court in support

of that rule (R. 34, 35) are not at all in point. Regardless of the established rules of taxation of personal property, that tangible property is taxed where it is found or located and intangible property at the domicile of its owner, and even in two jurisdictions under certain conditions, such rules do not affect sales or transactions in interstate commerce, except only as bearing on or as proof of sales and deliveries of property from one state to another or to foreign countries.

In discussing the subject of situs and the rule of "mobilia sequuntur personam" the State Court in its opinion in part said: "If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers" (R. 35); from which the Court concluded that "The activities of the appellee's (appellant here) agents in making the sales did not change the situs of his securities any more than they affected his domicile", and "That said activities incidentally involved interstate commerce is immaterial." (R. 35.)

Naturally the situs remained at the appellant's place of domicile in Indiana for all purposes of taxation until title to the securities sold passed to the purchasers upon delivery in New York. The same is true of the Adams case, or any case of sale F. O. B. at destination, in which case the situs of the property sold, for the purposes of taxation, remains where it was until title passes upon delivery to the purchaser. The intangibles of appellant so sold were taxable for Intangibles Tax of Indiana and for Gross Income Tax on the dividends and interest received therefrom and for gross receipts upon intrastate sales thereof, if any had been sold intrastate, at the place of his domicile in Indiana until title passed to the purchasers on delivery

in New York. It was the responsibility of appellant to deliver at New York the securities sold, as agreed and intended by the appellant and the buyers and according to the rules of the New York Stock Exchange.

The delivery point, where the title passes in sales of property, is the place agreed upon and intended by the seller and the buyer, and is the place where the situs, for purposes of taxation, changes from where it was before sale to where it is afterward.

In re Globe Varnish Co. (1940), supra, 114 Fed. (2d) 916, affirmed 312 U. S. 690.

In that case, involving a sale and shipment from Illinois and delivery in Wisconsin according to the intent of the parties, the Court held that "as Wisconsin has the right to levy a compensating use tax on property such as here involved, Illinois, aside from the exemption, cannot validly levy a privilege tax measured by the proceeds of the sale, as this would result in two taxes upon an interstate sale, while a local sale would be subject to only one." (114 Fed. (2d) at page 919.)

There the situs changed immediately upon delivery in Wisconsin, when and where the property became subject to taxation in the State of Wisconsin.

This is in accord with the holding in the case of McGoldrick v. Berwin-White Coal Mining Co., supra (1940), 309 U. S. 33, 60 Sup. Ct. 388, wherein the Supreme Court of the United States said:

> "Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey

from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority." (60 Sup. Ct. at pages 395-396.)

The appellant is unable to comprehend the reasoning of the State Court in this connection (R. 34-35), for surely there can be no doubt but that the situs of appellant's intangibles changed at the place of delivery, New York, on the sales thereof in interstate commerce, whereupon they became immediately taxable at their new situs in the state of the buyer.

It does not appear that this proposition or reasoning of the State Court, which was advanced by the appellee herein in that Court, constitutes any sound or logical basis for the decision of the Court against the appellant.

* * * * * * *

The appellant respectfully submits, therefore, that the Gross Income Tax Act of 1933 of the State of Indiana cannot constitutionally be enforced against the appellant on account of his sales of said intangibles in interstate commerce, because the application of the tax imposed thereby to his gross receipts from such sales is in violation of and repugnant to Article 1, Section 8, of the Constitution of the United States.

Conclusion

In view of the foregoing, the decision of the Supreme Court of the State of Indiana should be reversed.

Respectfully submitted,

GATH P. FREEMAN,
Attorney for Appellant.

APPENDIX A

Chapter 117, Indiana Acts 1937

Burns Indiana Statutes Annotated 1933

1943 Replacement

Section 64-2601, et seq.

AN ACT to amend Sections 1, 2 (reciting the sections and title of the Gross Income Tax Act of 1933, and of prior amendments thereto) and declaring an emergency.

Section 1. Be it enacted by the general assembly of the State of Indiana, That Section 1 of the first above entitled act be amended to read as follows: Sec. 1. That this act may be cited as the "Gross Income Act of 1933."

* * *

(a) When used in this act the term "person" or the term "company" herein used interchangeably, means and includes any individual * * * fiduciary, trustee, executor * * * corporation * * * engaged in private or proprietary activities or business, estate, trust, or any other group or combination acting as a unit * * *. (Burns Indiana Statutes, 1943 Replacement, Sec. 64-2601; Sec. 1, Ch. 117, Indiana Acts 1937, p. 604.)

* * *

(m) The term "gross income", except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, * * * and the gross receipts of the taxpayer received from trades, businesses, or commerce, * * * and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets * * * damages, or judgments, and all receipts received by reason of the investment of

capital, including but not in limitation thereof, interest, discounts, rentals, royalties, dividends, fees, commissions, and receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations, and all other receipts of any kind or character received from any source whatsoever, and without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character: Provided, however, * * *

(Here follow certain exceptions not pertinent to this case.) (Sec. 64-2601, supra; Sec. 1, Ch. 117, Indiana Acts 1937, pp. 606, 607.)

Section 2 describes the general scope of the Act as follows:

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided. (Burns Indiana Statutes, 1943 Replacement, Sec. 64-2602; Sec. 2, Ch. 117, Indiana Acts 1937, p. 611.)

Section 3 contains the specific imposition of the tax upon different types of gross income or receipts and specifies the rates applicable thereto. The provisions of Section 3 pertinent to this case are as follows:

> Sec. 3. The tax upon the receipt of gross income hereby provided for, shall be measured by the amount or volume of such gross income and shall be imposed at the following rates:
>
> * * *
>
> (f) With respect to that part of the gross income of every person which is received from any source not enumerated in subsections (a) to (e), inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal services * * * all funds received from the investment of capital, and all receipts received from any source whatsoever, the tax shall be equal to one per cent of such part of the gross income. (Sec. 3, Ch. 117, Indiana Acts 1937, pp. 611, 613; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2603. Note: This is subsection (g) in 1943 Replacement.)

(Note: Subsections (a) to (e), (a) to (f) in 1943 Replacement, inclusive, provide, respectively, for a tax of one-fourth of one per cent on gross receipts from wholesale sales, display advertising, one per cent on retail sales, utility service, etc.)

Section 5 provides for a deduction or exemption of $1,000 annually from the gross income of each taxpayer, except retailers, whose deduction is $3,000. (Sec. 5, Ch. 117, Indiana Acts 1937, p. 614.)

Section 6 is a disclaimer of intention to tax receipts derived from interstate commerce, designed to preserve the constitutionality of the Act, and reads as follows:

Sec. 6. There shall be excepted from the gross income taxable under this act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America * * *. (Sec. 6, Ch. 117, Indiana Acts 1937, p. 615; Burns Indiana Statutes, 1943 Replacement, Sec. 64-2606.)

Subsection (c) of Section 8 provides as follows:

(c) Trustees of trust estates, created by will, by contract, by declaration of trust, or by implication of law, shall make returns covering all gross income received by the trust in accordance with such provisions of this act as apply to individuals and other taxpayers. Only one deduction as provided in section 5 may be taken on such return, regardless of the number of beneficiaries of the trust. (Sec. 8 (c), Ch. 117, Indiana Acts 1937, p. 619; Burns Indiana Statutes, 1943 Replacement, Sec. 64-2608.)

The Act contains provisions for collection of the tax, penalties for delinquency, the right to command the sheriff by warrant to levy upon the property of the taxpayer, and to enjoin a delinquent taxpayer from continuing in business, and other remedies, both civil and criminal, to enforce collection of the tax. (Sec. 13, Ch. 117, Indiana Acts 1937, pp. 628-631; Burns Indiana Statutes, 1943 Replacement, Sec. 64-2613.)

APPENDIX B

Regulations, Gross Income Tax Division

Issued April 15, 1940

The pertinent Regulations of the Gross Income Tax Division of Indiana, are as follows:

"Regulation 3900. Interstate Commerce. (The first paragraph recites the provisions of Section 6 (a) of the Gross Income Tax Act, supra, excepting interstate commerce transactions from the purview of the Act.)

"The Department does not include herein any specific rulings on interstate commerce since such transactions involve many technical features, and court decisions vary in their determinations of its necessary elements. Therefore, each question involving interstate commerce must be submitted to the Department and will be considered on its individual merits and the Department herein reserves the right to adjudicate in every case whether or not there exist sufficient elements of interstate commerce to exempt from tax the receipts of any particular transaction.

"Whenever any taxpayer considers any of his receipts to be exempt from gross income tax because of the immunity of an interstate commerce transaction, he will be required to submit all of the facts * * * and such other relevant data as may be required by the Department.

"All taxpayers who are required to file gross income tax returns must include thereon all receipts derived from interstate commerce transactions even though such receipts are not taxable. Proper deductions may then be made on the return for non-taxable receipts.

"The Department will not interpret hypothetical questions involving interstate commerce." (Official Regulations 1940, Article 39, p. 72.)

Intangibles

Regulation 1212 is merely declaratory of the law as provided in the Act (Section 1 (m), supra) and is as follows:

"Regulation 1212. Other Intangibles. Gross receipts from the sale of intangible property are taxable at the rate of 1%. The term intangible property includes notes, stocks in either foreign or domestic corporations, bonds, debentures, * * * and any and all other intangibles capable of being transferred, acquired or sold. The physical situs of the intangibles shall have no bearing upon the taxability of the receipts from the sale or transfer thereof. * * *" (Official Regulations 1940, Reg. 1212, Art. 12, p. 21.)

Out-of-State Sources of Income

"Rule 7.—Sales of Intangible Assets. Persons resident and/or domiciled in Indiana will be required to report for taxation all proceeds from the sale of intangible property where the legal situs of such property is in Indiana, even though sale is made outside the state. * * * This will also include all receipts of persons resident and/or domiciled in Indiana derived from outright sales of securities or from marginal stock transactions negotiated through brokers situated outside the state. The legal situs of all intangibles is presumed to be the domicile of the owner. * * *" (Official Regulations 1940, Reg. 3500, Article 35, Rule 7, p. 72.)

Definitions

Regulation 100 is merely declaratory of the law as provided in the Act, defining the word "person" (Section 1 (a) of the Act, supra) and is as follows:

"Regulation 100. Person and Taxpayer are synonymous and taxable persons are those defined herein who are within the qualifications of Reg. 101.

"Person includes any 1. Individual—5. Fiduciary—6. Trustee—28. Estate—29. Trust * * *" (Sec. 1 (a).)